No. 12013

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH BARSOCK,

Appellant and Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent and Plaintiff.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This appeal is from a judgment of conviction of murder on Government property, Title 18, U. S. Code, Sections 451 and 452 thereof, said judgment having been entered by the United States District Court for the Southern District of California, at Los Angeles, California, on July 26, 1948 [Clk. Tr. 27].

The defendant and appellant, Joseph Barsock, was charged in Count One of the Indictment with having shot and murdered Howard Everett Jepson, with premeditation and malice aforethought, on the date of April 3, 1948,

in Los Angeles County, California, within the Central Division of the Southern District of California, and on lands acquired for the use of the United States and under the exclusive jurisdiction of the United States, namely: the United States Naval Station, Terminal Island, California [Clk. Tr. 2].

In Count Two of the Indictment the defendant and appellant was charged with the offense of murder of Howard Everett Jepson, with malice aforethought, in the perpetration of the robbery of (one) Edwin Craven Ballard, on the same date and place as set forth in Count Two [Clk. Tr. 3].

A motion was made by defense counsel for a judgment of acquittal as to Count Two, in its entirety at or near the end of the Government's case [Rep. Tr. 494].

The Court entered a judgment of acquittal on the second count, which pertained to the robbery only, and which left pending the first count [Rep. Tr. 503].

A verdict of guilty as charged in Count One of the Indictment without capital punishment, was returned by the jury on June 12, 1948 [Clk. Tr. 24].

It was further adjudged that the defendant be committed to the custody of the Attorney General or his authorized representative for life imprisonment [Clk. Tr. 27].

A notice of appeal was filed by the defendant-appellant on August 3, 1948 [Clk. Tr. 31, 32] to this Court, which has appellate jurisdiction under Title 28, U. S. C. A., Sections 225, 345 and 1291.

STATEMENT OF THE CASE.

Facts.

The statement of facts set forth in Appellant's Opening Brief, commencing on page 1 thereof, is not acceptable to appellee for the reason that the statement is too selective, and interpretative, and incomplete. The following summary of the evidence pertinent to the questions before this Court is submitted as a more objective synopsis.

The appellant and defendant, Joseph Barsock, was born in New Orleans, Louisiana, on March 2, 1926. He was discharged from the United States Naval service in December, 1947 [Rep. Tr. 447, 448 and 449], at Long Beach, California.

On March 31, 1948, after a plea of guilty to illegal wearing of the United States Navy uniform, he was sentenced by Honorable J. F. T. O'Connor, in the United States District Court for the Southern District of California, to six months in jail, sentence suspended, and placed on three (3) years probation in Case No. 19884 [Pltf. Ex. 42, Rep. Tr. 523].

Appellant was released from the Los Angeles County Jail March 31, 1948, took a room at a Los Angeles Hotel, checked out of said hotel April 2, 1948, and put his bags in a storage locker at Pacific Electric Station in Los Angeles, and took a train to Long Beach, California. While wearing a Navy enlisted man's uniform, rate Seaman First Class, he entered Gate 1 of the Terminal Island Naval Base about 5:30 p.m. on the date of April 2nd [Pltf. Ex. 41].

During this time, appellant had ample civilian clothing in his bags and luggage which was checked in the Pacific Electric station locker, as aforesaid, and which clothing

was worn by the defendant during the course of this trial, after having dressed in the United States Marshal's office in the presence of F. B. I. agent Alfred G. Gunn, prior to the trial [Pltf. Exs. 34, 35, and Rep. Tr. 446, 450, 451 and 452]. Appellant spent the next three or four hours in the recreation hall on the Naval Base and after taps went to Barracks No. 34 to sleep. After he was there a few minutes, he was seen taking a blanket off one of the bunks by the Master at Arms, Charles Schoen [Pltf. Ex. 41, and Rep. Tr. 161, 162]. He was then taken to Gate 1 on the base to see the Officer of the Day, Lieut. George Carey, who was the Base Security Officer and Senior Watch Officer. It was around midnight when Mr. Carey returned from his last inspection of the base and saw appellant for the first time. Appellant came to attention and stood up, as the officer entered. He admitted taking the blanket, said he just arrived that day; said he realized the seriousness of it, and promised there would be no recurrence of this case if allowed to go back to his barracks. The officer then directed appellant be taken back to Barracks 38 for the night [Rep. Tr. 207, 209, 210 and 211].

When asked for his identification by the Master at Arms Schoen, the appellant produced an identification card and a liberty card, both bearing the names of Lawrence Arthur Clover. These same cards were shown to the Officer of the Day [Rep. Tr. 224, 225]. No permission was given by Clover at any time to anyone to use said two cards, which were missing with his billfold since March 30, 1948 [Rep. Tr. 199 and 203].

Upon return to the barracks the Master at Arms questioned appellant about the clothing he was wearing [Pltf. Ex. 41]. The name stenciled in ink on his hat was

Morris; that on his undershirt was Sawyer; that on his socks was Coats [Rep. Tr. 168 and 169, also Pltf. Exs. 11, 12 and 13]. He was told to wait there while the O. D. (Officer of the Day) was called. Instead he got dressed, left the barracks and climbed over the barbed wire fence and left the Navy Base. Appellant was apprehended by Chief Petty Officer Robert D. Cox, who was in charge of a roving patrol and on watch that night. His duties were prescribed under instructions and orders of the Commanding Officer of the base [Pltf. Ex. No. 22, Rep. Tr. 285, 286].

Upon being returned to the Security Officer by Chief Cox, appellant was questioned by Chief Petty Officer Wiley D. Bennett, who was Junior Officer of the Day [Rep. Tr. 293, 294]. He told Cox about 2 a.m. that he was Clover, that was his name; that he had been transferred from the Naval Hospital that afternoon at 3:00 p.m., from Ward N-10. Chief Cox checked with the Navy Hospital and was informed Ward N-10 had been closed for a month [Rep. Tr. 298]. Defendant was told he was under arrest and would be taken to the brig at the dispensary [Pltf. Ex. 41].

The committment papers [Pltf. Ex. 8] were signed by the O. D., Lieut. George Carey, about 3:00 or 3:15 a.m. [Rep. Tr. 227, 228]. As Officer of the Day at the Naval Station, Mr. Carey was the direct representative of the Commanding Officer of the Navy Base [Rep. Tr. 216, 217]. Appellant was charged with: (1) jumping ship (leaving a base without authority); (2) unauthorized wearing of other men's clothing, and (3) roving about the grounds and barracks after taps [Pltf. Ex. 8].

The guards took appellant to the dispensary in a station wagon. One guard, known as a "prison chaser" was

armed with a .45 caliber service automatic. His name was Ballard and together with Harris, who drove the car, they took the prisoner to the sick bay or dispensary [Rep. Tr. 335, 337, 338, 341, 342].

Ballard was with the prisoner at all times while at the sick bay or dispensary [Rep. Tr. 344]. The doctor on duty was Lieut. George A. Benish, but he didn't see the prisoner as he was busy with an emergency case [Rep. Tr. 124, 125]. Chief Pharmacist's Mate, Howard Everett Jepson (the deceased), examined the prisoner and signed his medical clearance papers before being taken to the Brig [Rep. Tr. 345, 346]. Chief Jepson was not on duty officially that night, but was merely helping take care of emergency cases [Rep. Tr. 124].

The papers were signed about 3:15 a.m. and the guard, Ballard, took the prisoner out the back door of the dispensary into an enclosure, similar to a courtyard, formed by the buildings, en route to the Brig [see Pltf. Ex. 2—a map of area, and photographs, Pltf. Ex. 23]. The prisoner was ten or twelve feet ahead of the guard, when he turned, jumped on the guard and, after a struggle of approximately five minutes, wrested the gun away from him, then backed off fourteen or fifteen feet, racked the mechanism of the automatic pistol back, thus throwing a shell into the firing chambers [Rep. Tr. 347, 348, 349]. Appellant then held the gun on the chaser, who made no attempt to come toward him. Just then someone appeared from the direction of the driveway; the chaser (Ballard) hollered to this person, "Hold it, Chief. He has got my

gun" [Rep. Tr. 350]. Appellant then turned and fired the gun at the person in the driveway. He heard him groan, and realized he had hit him; never shot any more, but ran out of the driveway to the main gate, slipped past the guard where he was not looking, and headed across the field toward the channel on the north side of the island [Pltf. Ex. 41, and Rep. Tr. 351, 538].

Doctor Benish was called; they carried the victim into the dispensary; emergency treatment was given but he died in five minutes, at 3:30 a.m.—April 3, 1948 [Rep. Tr. 134 and 141]. The victim was identified as Chief Jepson [Rep. Tr. 131], and the cause of death was a gun shot wound that penetrated the entire body, the bullet having gone through the heart [Rep. Tr. 158, Pltf. Exs. 6 and 7].

Appellant, after leaving the Navy Base, came across a car parked near some oil wells, broke into the door window with the butt of the gun and took a leather jacket from the car, after which he climbed aboard a ship anchored in the channel, took off his clothes, put the gun [Pltf. Ex. 20] under his pillow and lay down on the bunk and went to sleep, where he was apprehended and arrested by officers of the Long Beach Police Department at about 10 a.m. [Pltf. Exs. 41, 25 and Rep. Tr. 392 to 405, incl., and 539].

QUESTIONS INVOLVED.

I. Whether or not the legality of arrest and custody prior to a killing, and by persons other than the deceased, was material to the issue [Rep. Tr. 598 and 599].

A. Where A arrests B, and while in custody B overpowers A's guard, and thereafter with A's gun kills C, a 3rd person, is it material whether the arrest was lawful or unlawful?

B. If such arrest were in fact lawful, is there any prejudicial error in an instruction that said legality was immaterial?

C. If such arrest were illegal, which is not conceded, and after the chain of custody is broken, the defendant kills another as his next step to escape, is this not an intervening or superseding factor that precludes reduction of the offense to manslaughter or a matter of law?

1. If so, is it error to instruct that legality or illegality of arrest is not material? Is not such error harmless, if any?

II. Whether in the trial of a defendant indicted on two counts, and the court grants defendant's motion for acquittal on one count, there is error in denying his motion thereafter to enter a plea of former jeopardy on the remaining count? [Clk. Tr. 3, and Rep. Tr. 503.]

A. Whether a defendant is entitled to a plea of former jeopardy, where there has been but one trial, one jury, and one count of his indictment presented to that jury?

ARGUMENT.

Summary.

The appellant and defendant through his counsel bases his appeal primarily upon the premises that his arrest and temporary detention were both unlawful. If such were the case, he contends that the killing of Chief Jepson would at most constitute manslaughter, as a matter of law. Should this premise prove fallacious, it must follow that his specification of error, Number One, is without merit.

The facts are undisputed that Chief Howard Jepson had nothing to do with the arrest or detention of defendant. He was not on duty that night officially but volunteered his services during a period of emergency. He examined the defendant in the dispensary and signed his medical clearance, which was routine procedure in the case of every prisoner prior to being sent to the Brig, or Navy guard house.

The facts are undisputed that the arrest was made by other Navy personnel, that the statement of charges placed against the defendant were signed by other Navy personnel, that prior to the shooting defendant was in the custody of a Navy guard known as a prison chaser, that prior to the shooting the guard was overpowered and defendant gained possession of the guard's gun, that at no time did Chief Jepson have a gun, nor did he say anything that anyone understood immediately prior to the time defendant shot him.

Therefore, since the defendant held dominion over the entire situation, since he now had a loaded gun in hand and held his former custodian at bay, since his arrest, legal or otherwise, was broken, and he stood free of all

physical detention, the shooting of Chief Jepson, when he appeared in the driveway, was an event subsequent to and independent of the arrest and custody.

Thus the time had passed during which defendant could claim he was illegally arrested and detained. The connection between a killing to escape from one type of arrest distinguished from another had been severed. In legal effect, defendant stood in a new relationship toward Jepson, a third person, much the same as if never arrested or detained. Then, it becomes a question for the jury, whether it was a killing with malice aforethought and premeditation, and on this point the jury has spoken in the affirmative.

The arrest and temporary detention of the appellant was both lawful and justified under the circumstances. There is ample authority for a Commanding Officer of a Naval Station, or his authorized personnel, including the Security Officer, Chief Petty Officer, and enlisted men, who were performing their duties in the chain of command directly under their superior officer, to make an arrest of a civilian who was found committing offenses within a military or Naval establishment. Where such offenses are committed within the reservation and the subject escapes by climbing over a fence and is pursued immediately thereafter, he may be held until he can be released to the proper civilian authorities.

California Statutes provide that an officer or a private person may make an arrest for misdemeanors committed in their presence. Had it been known to the Navy personnel at the time of the arrest of appellant that he was a civilian, he could have been arrested for the offense of wearing the service uniform illegally, which is a federal offense in addition to the offense defined under the

California Statutes of disturbing the peace of the garrison in question. But for the deception of the defendant and his false representations, the parties in making the arrest would have known he was a civilian and would have acted accordingly.

However, at all times he represented to them that he was an enlisted man in the United States Navy; that he had been discharged from a Naval Hospital that afternoon, and that his name was CLOVER, and produced two identification cards bearing that name and at no time did he disclose to anyone during the time in question that he was a civilian. Therefore, the doctrine of estoppel should apply to the appellant, and he should not be heard to say that Naval personnel had no authority to arrest him for offenses which would otherwise be punishable under the Articles for the Government of the Navy. It would defeat the ends of justice if one is allowed to hide behind his own deception and set up a defense of illegal arrest, such as proposed here. The equitable doctrine of estoppel has been applied to cases at law and has been raised in criminal cases, not only against the Government, but others according to well recognized authority.

Even where the arrest of a defendant is illegal, which is not here conceded, the prisoner may not take the life of an officer or person attempting to make his arrest, unless the circumstances at the time are sufficient to justify a reasonable man in the belief that his life is in danger, or that he is in danger of great bodily harm from the person making the arrest. Therefore, when there is no show of force by the person making the arrest, or by third persons such as the deceased in this case, the homicide is neither justified under the theory of self-defense, nor is it reduced from murder to manslaughter. The

law of California, and that of other jurisdictions cited by the appellant, pay lip service to the rule, but in each case set forth hereinafter, it is either an exception to the rule, or the courts vigorously affirm that the rule does not apply therein. In the present case, we submit that the rule has no application either.

It is further contended by appellant that he was placed in double jeopardy by standing trial on one count of his Indictment, after the second count had been dismissed upon the motion of his counsel and the Order of the Court. Under the Fifth Amendment to the Constitution, and the decisions of the courts, it has been held that one is not entitled to a plea of former jeopardy unless he has been placed on trial for the offense and acquitted, or convicted, prior to the trial in question. Where there has been but one trial and the defendant has been placed in danger of his life, or liberty, before only one jury, and where there has been only one verdict and judgment arising out of the single offense such as we have here, he has no standing to enter a plea of former jeopardy where he was acquitted on one count of an Indictment, and convicted upon the other in the same proceeding.

In conclusion, the judgment of the trial court should be affirmed unless from a review of the record and all of the evidence, it appears that whatever error was committed, if there was any, was prejudicial to the defendant and resulted in a miscarriage of justice. We submit that no error was committed by the trial court in this case, but if an error were committed, it was harmless, and the appellant was not prejudiced thereby. Therefore, since appellant was accorded a fair and full trial, and no reversible error committed by the trial court, the judgment should be affirmed.

POINT I.

The Trial Court Committed No Error in Its Instruction That the Evidence in the Case Is Not to Be Considered by the Jury in Connection With Whether the Arrest and Detention of the Defendant by Navy Personnel, Other Than the Deceased Jepson, and Prior to the Killing, Was Lawful or Unlawful.

A. It Was Immaterial Whether the Arrest and Custody Was Lawful or Not.

The appellant concedes that it is a matter of law whether the arrest of the defendant before the shooting, was legal or not [Appendix B, p. 5 of App. Br.; also Rep. Tr. 600]. The trial court said:

> "If you wish an instruction on that, I will instruct them it was legal, but I am telling them that it is immaterial, that is, the acts and conduct of all the other Navy personnel, except Jepson. Now the jury can take into consideration anything they want concerning the acts and conduct of Jepson, because he was the man that was killed."

It might be urged that this was a mixed question of law and fact,—but appellant insisted at the trial, and republishes his position in above appendix, that it was a matter of law that the arrest was illegal, and that the detention was illegal and that the Court should so instruct the jury. He complains in effect upon appeal that the trial court erred in saying that "when A arrests B, who overpowers A an hour or two later, then shoots C, it was immaterial whether A observed all the technical requirements of law in making that arrest and confinement."

If the trial court's position on this point was correct, this judgment should be affirmed, for this is the paramount issue on appeal. We must bear in mind that appellant did not then, nor does he now contend this was a question of fact for the jury, whether he was originally arrested and confined according to the letter of the law. We must further bear in mind that the Trial Judge who ruled as he did on the matter, was present during every hour of the trial, heard every word of the testimony, saw every exhibit as it was introduced, and was in command of all the circumstances as this crime was reconstructed for the record. Was he not then, as all trial courts are, in the best possible position to evaluate the course of events, one in relation to another, and to decide when one chapter of the evidence closed and another began? Were there not two and only two chapters here, namely, the series of acts in which appellant was involved from the time he was first observed under suspicious circumstances by the Master at Arms Schoen, to the time he overpowered Ballard, his guard, and took his gun from him; and the second chapter beginning as the defendant now free and master of the situation, stepped back several paces from his former guard, racked the mechanism of the automatic pistol back and threw a live round of ammunition into the firing chamber, held Ballard at bay until a figure of a man appeared near the exit from the enclosure—then he shot that man and took to flight to end this chapter.

In reflection upon the trial court's judgment in denying that in chapter two, it mattered not whether defendant had or had not been lawfully arrested or detained in chapter one, we are constrained to quote the words of

this Court in the case of *Henderson v. United States,* 143 F. 2d (9 Cir.), on June 28, 1944—where it said at page 682:

> "* * * Judges and juries do not begin the solution of the complex problems presented to them from a zero of knowledge. They start with the vast common knowledge and understanding possessed by the people. Applying such common knowledge and understanding to the evidence in this case, can there be the slightest doubt about the essentials of this case!"

On the issue of malice aforethought and premeditation with which Barsock killed Navy Chief Jepson, the jury has spoken and called it murder. Notwithstanding, appellant submits that the crime at most amounts to manslaughter. He does not gainsay that he killed Jepson, but his position is in effect that the illegality of his arrest and detention were sufficient provocation as to reduce the offense to manslaughter.

Title 18, U. S. C. A. 453, defines manslaughter as follows:

> "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> "Voluntary—Upon a sudden quarrel or heat of passion.
>
> "Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. (R. S. §5341; Mar. 4, 1909, c. 321, §274, 35 Stat. 1143.)"

California Penal Code Section 192 is identical.

Of the two kinds of manslaughter, only the voluntary kind can be considered as applicable. On provocation the law has long been settled that to reduce the killing from murder to manslaughter, the provocation, to be available, must have been reasonable and recent, for no words or slight provocation will be sufficient. (*United States v. Lewis* (C. C. Tex. 1901), 111 Fed. 630.)

Now it is undisputed from the evidence that the deceased was unarmed; that he had no weapon of any kind, that he said nothing whatsoever that anyone could understand between the time he appeared in the driveway and the time he was shot; and that he was several paces distant from defendant at the time of the shooting, estimated to be about 60 feet [Rep. Tr. 373, line 20].

Where, therefore, do we find on the part of Jepson, the recent and reasonable provocation of which the *Lewis* case speaks? Nowhere, and none was ever claimed by appellant. On the other hand, he asserts it is to be found, if at all, in the alleged illegal arrest. If such is the law as applied to the facts of the present case, we bow humbly before that authority. But first let us examine the decisions and especially some of the cases cited by appellant. *40 Corpus Juris Secundum,* 1023, Section 137(b), is cited for the general rule, and he draws up the heavy artillery of the *Starr* and *Brown* cases, cited on page 14 of his brief, as being consistent with this rule. The respondents are then challenged to show any federal authority inconsistent with it. At this point we desire to add a better reasoned and more recent case to those cited, in support of this point, namely, that of *John Bad Elk v. U. S.,* 177 U. S. 529. The latter case was decided in 1900, whereas the *Starr* case was decided 1894 and the *Brown* case in 1895.

Now comes the appellant and cites four leading California cases in support of their position after submitting that there is no federal authority inconsistent with the general rule. We shall see how these cases fared upon appeal. First, it must be noted that each and every one of these cases presents an issue of an illegal arrest by the deceased. That issue is not present under the facts here.

In *People v. Gilman* (1920), 47 Cal. App. 118, 123, 190 Pac. 205 (cited by appellant in his brief at p. 15), the Court said:

> "It cannot be doubted that the doctrine contended for by appellant, and stated in the opinion of the court in People v. Dallen, 21 Cal. App. 770, 132 Pac. 1064, that 'where, in resistance to an illegal arrest, the extreme of taking the life of the officer is resorted to, the homicide cannot at most be more than manslaughter,' finds support in a well-recognized line of authority. (Cases cited.) To admit, however, the application of this doctrine there must be evidence, not only that there was an illegal arrest, but that the killing was done in actual resistance to the act of making the arrest or maintaining the illegal custody of the defendant. It cannot be admitted that a person who is merely formally restrained by a verbal notice that he is under arrest for a misdemeanor can respond by shooting to death the officer, and escape the charge of murder on the ground that he was protecting his liberty from illegal restraint (citing cases)."

The facts in that case were briefly that the decedent, who was a special deputy sheriff, came upon a neighborhood quarrel in which the defendant was involved. He announced he was an officer. The defendant used loud and

profane language toward his neighbor in the presence of women and children, which clearly constituted a breach of peace under California law. The decedent then ordered the defendant from the premises and apparently took him into custody, and went toward defendant's house. Defendant entered his house while the decedent remained outside on the steps, reappeared with a revolver in his hand and killed the arresting officer. The defendant and appellant was convicted before a jury in the Superior Court of San Diego County of murder in the first degree.

In that case the appellant objected to the ruling of the trial court in refusing an instruction in behalf of defendant to the effect that where the evidence shows that a homicide is committed in resisting an unlawful arrest, the defendant on conviction is limited to manslaughter.

The judgment was affirmed in that decision, and the Court had this further to say:

> "In this case the arrest was effected by notifying defendant that he was under arrest. Had he at that time resisted, and, in a struggle to regain his freedom, killed the arresting person, there might be room for the application of the doctrine contended for. But the homicide here occurred some time after the arrest, while the defendant was out of the physical control of the officer."

In the case of *People v. Dallen* (1913), 21 Cal. App. 770, 775, 132 Pac. 1064, and cited by appellant on page 15 of his brief, the California Supreme Court had this to say:

> "There can be no doubt that a person has the right to resist an unlawful attempt to subject him to arrest (citing *People v. Craig,* 152 Cal. 43, 45 (91 Pac. 997), but the right to oppose an illegal arrest by

resorting to the extreme measure of taking life has never been and never will be laid down as a sound doctrine of the law, except where there exists or appears to exist to the person thus sought to be arrested, at the time the arrest is being attempted, circumstances which being sufficient to excite the fear of a reasonable man, would justify in him the belief that he was about to be injured in body or limb, or that his life was in danger of being destroyed by the party or officer attempting to make the arrest, in which case a perfect defense would be open to the slayer."

The defendant was convicted of the crime of murder of the second degree, and appeals from the judgment. One question raised on appeal pertained to the right of the deceased to arrest the defendant. The judgment was affirmed.

In the *Craig* case, cited above, and on page 15 of Appellant's Brief, the defendant and one Mack, were convicted in the trial court of the crime of assault with a deadly weapon. The principal defense in the trial court was that the attempted arrest of the defendants were illegal and that they were justified in such resistance as they made. The Court reiterated the general rule on the right of resistance to unlawful arrest but held that the arrest was lawful here and resistance not justified, therefore, the judgment was affirmed.

In *People v. Bradley* (1913), 23 Cal. App. 44, 46, 136 Pac. 955, the defendant was convicted of murder in the first degree and sentenced to life imprisonment. The defendant encountered a special policeman, the deceased, in the City of Oakland; the officer was in plainclothes and without any insignia of his office. He halted the defend-

ant by saying "You are under arrest," or "Come with me to the lock-up." The defendant, at first, submitted to arrest and proceeded quietly to accompany the deceased for a short distance until they came to an alley, whereupon the defendant suddenly turned into the alley and immediately cried out to the deceased "Come on and have it out." Without more ado, the defendant fired two shots from a revolver at the deceased, which killed him instantly. Defendant then fled from the scene of the crime and was apprehended several months later. The California Supreme Court had this to say, in affirming the judgment of the trial court:

> "We are satisfied that the evidence is amply sufficient to support the verdict of the jury finding the defendant guilty of wilful and malicious murder. Not even the semblance of a legal excuse is shown for the killing of the deceased. It may be conceded that the evidence does not show that the arrest of the defendant was authorized, and that, therefore, it was a trespass against the person of the defendant, which might have been rightfully resisted with the same degree of force employed in making the arrest. The evidence, however, affirmatively shows that no force or show of force was resorted to by the deceased at any time. The mere fact that the deceased failed to reveal his identity as a peace officer, and the further fact that the arrest was apparently unauthorized and not made in strict accord with the forms required by law, may have justified the defendant in breaking the arrest, but such facts alone were wholly inadequate either to justify the killing of the deceased or to reduce such killing from murder to manslaughter."

Thus it may be seen from the foregoing California decisions that the Court paid lip service to the doctrine of the

right to resist an illegal arrest, but found nowhere in these cases where that rule applied and consequently affirmed each and every judgment of the trial court below.

In *People v. Wolfgang,* 192 Cal. p. 754 (1923), another landmark decision of the California Supreme Court, the defendant was convicted of murder in the first degree and sentenced to serve the death penalty. The decedent was a regular patrol man of the Police Department of Los Angeles. The defendant was charged with stealing two bottles of milk. The officer's attention was called to this by a night watchman, specially employed to watch the premises from which the milk was taken. The officer followed the defendant to his lodging house where he apprehended him and placed him under arrest. On the demand of the officer, the defendant produced the bottles of milk he had stolen and the officer thereupon said to him, "Consider yourself under arrest. You have to come along with me." The defendant replied, "Please let me go into my room and get my money first, and then I go along with you." The police man agreed to this but within the room, the defendant later testified, the officer made an unprovoked assault upon him and he feared he was about to be killed, and testified he shot the police man to save himself. Upon the appeal the appellant contends that the Court erred in refusing to give a number of instructions requested by him relating to the authority of the officer to arrest the defendant, and under what circumstances arrests are illegal.

The Court held that the ruling of the trial court for refusing to give the requested instructions was correct. It was not necessary to inform the defendant of the intention to arrest him, for he was pursued and apprehended

immediately after the commission of the offense. Whether or not either the watchman or the deceased officer had authority to arrest the defendant in the first instance became an unimportant question and an immaterial consideration in the light of subsequent evidence. By his own testimony the defendant narrowed the issue to one of self-defense against an alleged unwarranted assault and entirely eliminated any issue or contention that he shot the police man while resisting an illegal arrest. He committed the act after being arrested and while in actual custody of the police man * * * the requested instruction would have interjected a false quantity into the case and would have been confusing to the jury. The judgment was affirmed.

B. The Arrest and Temporary Detention of the Appellant Was Both Lawful and Justified Under the Circumstances.

In *United States v. Travers,* 16 Fed. Cas. 537, cited by appellant in his Appendix A, page 21, we find a similar case to the present one, except that the killing occurred in the actual resistance to an alleged illegal arrest.

In this case Judge Story discussed the question of arrest as follows:

> "It is admitted on all sides that it was the duty of Geary and McKim (the two sergeants who attempted the arrest) to preserve the peace of the garrison * * * it was in the night; and if the guard house was the proper place of security it was lawful for Geary and McKim to arrest the defendant and to take him there. They had no right to apply imprisonment as a punishment but they had a right to secure him from doing further mischief and to confine him for a reasonable time before he could be brought before a competent tribunal."

The facts were briefly that Travers, who had been a mariner in the service of the United States, but whose term of service had expired a short time before, was engaged in tumultuous conduct with other men on a military reservation following a snowball fight. Some of the men were arrested and were ordered to the guard house, but the prisoner remained behind under the pretense that he wanted to take the blanket and some clothing from his bunk. Soon after two sergeants came after him and he resisted, going to the guard house, and threatened their lives. He shot and killed both of them as they attempted to take him into custody.

Section 1515, subsection 1, of Naval Regulations, which is set forth on page 7 of Appellant's Brief, provides:

> "The commandant or commanding officer of any naval station or other naval reservation situated within the limits of any State, Territory, or District, which has been acquired by the United States through purchase or otherwise for naval purposes, and over which the United States has exclusive jurisdiction, 'shall require all persons within the limits of such stations or reservations strictly to observe all existing Federal laws, including the penal laws creating offenses not otherwise covered by any act of Congress, of the State, Territory or District, wherein the station is located * * *.'"

Furthermore, this section provides that persons not in the Navy who commit offenses within the limits of such station or reservation, including the offenses contemplated by Section 289 of the United States Criminal Code, are subject to trial in the United States District Court for the district in which the station is situated.

Title 18, U. S. C. A. 468, Criminal Code, Section 289, provides, in part, as follows:

> "Laws of States adopted for punishing wrongful acts; effect of repeal. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section 451 of this title, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal shall be deemed guilty of a like offense and be subject to a like punishment; * * *"

Section 415, Penal Code of California, provides in part as follows:

> "§415. Disturbing the peace: * * * Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, * * * is guilty of a misdemeanor * * *."

Also, Title 10, U. S. C. A., Section 1393, reads in part as follows:

> "§1393. Protection of the uniform.
>
> "It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy, or Marine Corps: * * *"

"Any person who offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding $300, or by imprisonment not exceeding six months, or by both such fine and imprisonment: * * *"

However, the appellant insists that he was a civilian at the time which is in dispute. He further asserts that he was not on the reservation at the time of his arrest.

California Penal Code, Section 841, reads as follows:

"Notice of Authority and Intent to Arrest.—The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, *or is pursued immediately after its commission*, or after an escape." (Italics ours.)

Of course it is urged that appellant was arrested for the first time by the Chief Petty Officer Cox on the road to Long Beach, and was taken to the Security office where he was told he was under arrest and formal charges placed against him as set forth in Exhibit P8.

It must be remembered that the apprehension was one phase of a series of events which began when appellant was observed by Master-of-Arms Schoen in possession of a Navy blanket and he was restrained of his liberty by being taken to the Security Officer. It may be said that the arrest was made at that time and appellant was given an order by the officer to return to his barracks [Rep. Tr. 296]. Thereafter, he moved from barracks to barracks and was observed wearing the clothing bearing the names of at least three other Navy men and again the Master-at-Arms called the Security Officer. Soon after this the

appellant disappeared and climbed over the fence. The second detention was immediately after the commission of further acts of disturbing the peace of the garrison, and after escape, and after immediate pursuit.

There is ample evidence to sustain a charge even against a civilian under California Penal Code, Section 415. But, appellant further asserts that he was arrested without a warrant, which is uncontroverted, and that no felony had been committed up to that time.

California Penal Code, Sections 836 and 837 provide that a peace officer or a private citizen may arrest without a warrant for a public offense committed or attempted in his presence.

Next appellant cites the *Di Re,* 68 Sup. Ct. 222-228, 92 L. Ed. (Adv. Ops.) 218 (1948), case, on page 6 of his brief for the purpose that in the absence of a federal statute, the law of the state where an arrest without warrant takes place, determines its validity. Also, the Court said:

> "No act of Congress lays down a general Federal rule for arrests without warrant for Federal offenses. None purports to supersede State law." (68 Sup. Ct. 227.)

That case may be distinguished on the law and the facts in that defendant *Di Re* was arrested in an automobile without a warrant and without knowledge by the officers of any offense committed, but after being booked was searched and found to possess counterfeit gasoline coupons, which was a misdemeanor. Objection was raised

that the search was unlawful and that the evidence should be suppressed because of an illegal search. The Court so held.

In the present case we have an offense committed upon a military reservation in which the appellant violated the Navy regulations and was punishable thereunder, as a court martial might direct, or was subject to other disciplinary action by the commanding officer, had he been an enlisted man in the Navy. It is undisputed that at the time appellant arrived at the base, and in fact all the time up to and including the shooting it was never made known to Navy authorities that he was a civilian. It is undisputed that he represented that he was Clover, by displaying a liberty card and an identification card of a Navy enlisted man. He was dressed at all times in a regulation Navy uniform. He stated that he had reported that same day from the United States Naval Hospital at Long Beach, California. He stood at attention when the Security Officer returned to his office at the time of the first inquiry.

Therefore, the doctrine of estoppel should apply in a case such as this and appellant should not be heard to deny the authority of the Navy to take him into custody for violation of their regulations. He should not be heard to deny that he submitted himself to their jurisdiction by his conduct and representations. He should not be allowed to hide behind his own deception and claim at this time that the Navy had no authority to call him to account. He must be presumed to have known the Navy

regulations, especially pertaining to theft of Government property, wearing of other men's clothing, prowling about in the area after taps, and leaving his station without proper authority.

It is shown in Appellant's Brief, pages 1 and 2, that he enlisted in the Navy at the age of 17 and was discharged at the age of 22. During that time the Navy regulations must have been brought home to him, for it is noted in Article 20 for the Government of the Navy, Section 10, it is the duty of the Commanding Officer in the Navy to cause the Articles of the Government of the Navy to be hung up in some public part of the ship (or station) and read once a month to his ship's company.

The doctrine of estoppel originated in equity but has been applied in criminal cases. This doctrine has been applied against the Government in the case entrapment and Mr. Chief Justice Hughes in *Sorrells v. United States,* 287 U. S. 435, on page 445, stated:

> "When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefore. * * *"

> "It is said that where one intentionally does an act in circumstances known to him, and the particular conduct is forbidden by the law in those circumstances, he intentionally breaks the law in the only

sense in which the law considers intent. Ellis v. United States, 206 U. S. 246, 257. Moreover, that as the statute is designed to redress a public wrong, and not a private injury, there is no ground for holding the Government estopped by the conduct of its officers from prosecuting the offender. * * *"

By like token the doctrine of estoppel should be applied to the appellant in this case and it should be lawfully said that he was subject to arrest by Naval authority. Had the facts been known, and but for his deceit and misrepresentation it would have been clear to Naval authorities as well as a private citizen or peace officer that appellant was guilty of illegally wearing the service uniform during the entire period covering these events. This he knew also, for he had been placed on probation only three days before after conviction in the District Court, based upon this charge.

It is contended by the Government that his concealment of this fact was his prime motive to escape at all cost, even if it were necessasy to kill in order to avoid going back to jail, or stand revocation of his probation. This motive could be inferred from appellant's confession [Gov. Ex. 41], also his own testimony while on the stand [Rep. Tr. 538, lines 1 to 3].

At most, it can be said, appellant was detained temporarily and had it been disclosed next morning, had he spent the night in the Brig, that he were a civilian, it would have become the duty of the Commanding Officer to turn him over to civilian authorities.

C. Even Where the Arrest of a Defendant Is Illegal, Which Is Not Conceded Here, the Prisoner, May Not Resort to the Extreme Measure of Taking Life Unless the Circumstances Exist at the Time of the Arrest Which Are Sufficient to Justify a Reasonable Man in the Belief That His Life Is in Danger, or That He Is in Danger of Great Bodily Harm From the Person or Officer Attempting to Make the Arrest.

Where no force, or show of force, is shown by the person attempting to make the arrest, the homicide is neither justified nor reduced from murder to manslaughter. Therefore, this defendant was not justified in the extreme measure of taking life under such circumstances that were not reasonably sufficient to justify him in the belief that he was about to be injured, or that his life was in danger.

The Law of California has been reviewed in the foregoing cases cited both by the appellant and by the appellee and without exception, this rule of law appears to prevail in California. (*13 Cal. Jur.* Section 36, pertaining to homicide committed during resistance to arrest, p. 628.)

There are cases in other jurisdictions which support this rule which is founded upon justice and reason. Two cases in point are as follows:

Coats v. State, 141 S. W., p. 197 (Ark. 1911);

Reichman v. Harris, 252 Fed., p. 371, in particular at pp. 381 and 382, Note 5.

The *Reichman* case was cited by the appellants in their brief on page 14, for the proposition that one may resist an illegal arrest by using such force as is necessary to regain his liberty and if it reasonably appears that an officer in-

tends to kill him, or to do great bodily harm to prevent his escape, he may kill the officer in self-defense. However, that case was an action by Harris for false imprisonment rising out of alleged unlawful entry of his home and arrest thereafter by Reichman, Lee, and others. Upon the appeal, the judgment was reversed and the Court in its opinion stated in part as follows:

> "[5] Further, if Lee's entry into the house was without justification, still Mathew Harris was not for that reason alone entitled either to kill him or use a deadly weapon to repel him. Although a person may with reasonable force resist an officer attempting unlawfully to arrest him, yet his resistance must be proportioned to the danger threatened. A person has no right to kill an officer seeking to make an unlawful arrest, unless the circumstances lead him fairly and honestly to believe that he is in imminent peril of death or of great bodily harm; he may not resist with a deadly weapon in the absence of well-founded reason to apprehend greater injury than the unlawful arrest." *Reichman v. Harris,* 252 Fed. pp. 381, 382.

In the *Coats* case the defendant was convicted of murder in the first degree after he killed a City Marshal, who attempted to arrest him without a warrant for the offense of selling whiskey without a license. Upon appeal, one issue raised was that of illegal arrest as one of appellant's defenses. On that point, the Court had this to say:

> "An illegal arrest is no more than a trespass to the person. 'The attempt to take away one's liberty is not such an aggression as may be resisted with death.

Nothing short of an endeavor to destroy life will justify the taking of life.' 1 Bishop's New Criminal Law, §868; Creighton v. Commonwealth, 84 Ky. 103, 4 Am. St. Rep. 193; * * * Wharton on the Law of Homicide (3d Ed.) §407; Robertson v. State, 43 Fla. 156, 29 South. 535, 52 L. R. A. 751.

"Mr. Bishop says that the reason why a man may not oppose an attempt on his liberty by the same extreme measures permissible in an attempt on his life may be because liberty can be secured by a resort to the law.

"So it appears that, even in a case where the defendant kills an officer in resisting an illegal arrest, he can only oppose force with force as in other cases where he is assaulted, and, if the circumstances of the killing show that he acted with malice and premeditation, he is guilty of murder in the first degree. In short, he is placed in no better position than is any other person assaulted, and can only kill his assailant, when the danger appears to him as a reasonable person so urgent and pressing that he is in danger of losing his own life or receiving great bodily injury." *Coats v. State,* 141 S. W., p. 197 (Ark. 1911).

The California cases do not stand alone in stating what is believed to be the weight of authority on the question of the reduction of a conviction of murder to manslaughter where there is an illegal arrest or such circumstances present that make the illegality of such arrest and custody immaterial. In the case of *Friedsam v. State,* 116 S. W. 2d 1081 (Tex. Crim. 1938), the appellant was convicted of murder for the killing of a policeman.

According to the evidence, appellant hired a taxi cab driver, drove around for an hour and refused to pay his fare, thereupon the driver called the police who had no warrant of arrest and had not seen any offense committed in their presence.

"Appellant's only exception to the court's charge is a complaint that nowhere therein does it 'Charge the jury the law with reference to an unlawful and illegal arrest,' and to the same effect is his bill of exceptions No. 3, which charge was refused by the trial judge with the following qualification: 'Refused for the reason that I did not consider that the evidence as a whole raised the issue of unlawful arrest * * *.'"

"It is the Court's opinion that the trial judge was correct in his qualification when he said that the evidence did not call for any such charge, nor was appellant entitled to defend on such ground. There was no threat of any arrest; he knew the officers had been called, and they were in his plain view, calmly walking towards the house; they said nothing to him, and he said nothing to them; he knew they were peace officers, and with not a word of warning he shot one of them, thereby causing his death. These two men were there for his protection as well as for the protection of all the public, and * * * it would furnish a precedent that would certainly be dangerous to the lives and safety of police officers to say that when one having been called to come to certain premises, that, under fear of an illegal arrest, one lawfully on the premises had the right to kill such police officer, * * *."

POINT II.

No Error Was Committed by the Court in Denying Appellant's Motion to Withdraw a Plea of Not Guilty on Count One of the Indictment for Entering a Plea of Former Jeopardy, After the Court Granted His Motion for Acquittal on Count Two.

Jeopardy means the exposure to danger in a criminal prosecution and when a person is put on trial on a charge before a jury, which is sworn to decide the issue between the State or Government and himself, he is exposed to danger in that he is in peril of life or liberty. The rule not only prohibits a second punishment for the same offense, but it goes further and forbids a second trial for the same offense, whether the accused has suffered punishment or not, or whether in the former trial he has been acquitted or convicted.

> *Kepner v. United States,* 195 U. S. 100, 49 L. Ed. 114.

Former jeopardy, according to the old maxim of the Common Law, means that a man shall not be brought into danger of his life or liberty for one and the same offense more than once.

> *Ex Parte Lange,* 18 Wall., U. S. 163, 21 L. Ed. 872.

However, the decisions are based upon the proposition that a defendant has either been tried and convicted or acquitted on a former trial, or has been placed in danger of conviction before a jury which has been empaneled and sworn before he can raise the defense of former jeopardy. Such is not the case in the present matter. The appellant was indicted on two counts for murder, the second count alleging that he killed Navy Chief Jepson during the per-

petration of a robbery, namely, the taking of a United States Government pistol from Edwin Craven Ballard by force and violence. The first count merely alleged that the defendant killed Jepson with malice, aforethought and premeditation. [Clk. Tr. pp. 1 and 2.] At the end of the Government's case, counsel for the defense moved for acquittal on Count Two of the Indictment, and said motion of acquittal was granted by the Court, thereby leaving Count One outstanding to be presented to the Jury for their verdict. Now the defendant and appellant contends that at that point he was entitled to enter a plea of former jeopardy, since both counts alleged the facts sufficient to constitute murder, and since the evidence required to prove each Count was substantially the same. There is no merit to this contention of appellant and no convincing authority is cited therefor in his opening brief.

It has been held that the withdrawal of a Count of an Indictment from the consideration of the Jury amounts to an acquittal of a charge contained in that Count, but does not work an acquittal of a charge contained in another Count.

State v. Hess, 144 S. W. 489, 240 Mo. 147.

Also a dismissal or discontinuance as to one or more counts of an indictment, or as to one of several indictments is no bar to a prosecution on the others.

People v. Kirsch, 269 Pac. 447, 204 Cal. 599;

Bedell v. United States, C. C. A. Iowa. 78 F. 2d 358, Cert. Den., 296 U. S. 628, 80 L. Ed. 447.

See also:

Vol. 22 Corpus Juris Secundum Section 257, P. 393.

Section 380 of Volume 15, American Jurisprudence, at page 53 reads in part as follows:

> §380. Necessity that Second Trial be for the same Act and Crime.

The Common Law Rule and the Constitution declaratory thereof against a second jeopardy apply only to a second prosecution for the same act and crime, both in law and fact, for which the first prosecution was instituted.

It was held in the case of *Collins v. Loisel,* 262 U. S., 426 at p. 429 that the Constitutional provisions against double jeopardy can have no application unless a prisoner has theretofore been placed on trial.

> "Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in *Bassing v. Cady,* 208 U. S. 386, 391, not to constitute jeopardy."

Therefore, since appellant was tried only once for this offense, since he appeared before only one jury, which was empaneled and sworn to hear his case, he was not entiled to a plea of former jeopardy.

POINT III.

The Judgment of the Trial Court Should Be Sustained Unless From a Review of the Entire Record and the Evidence, There Has Been a Miscarriage of Justice.

This Court said in *Henderson v. United States,* 143 F. 2d 681 (C. C. A. 9, 1944), at page 682:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorable to the prosecution, United States v. Manton, 2 Cir., 107 F. 2d 834, 839; Shannabarger v. United States, 8 Cir., 99 F. 2d 957, 961; Borgia v. United States, 9 Cir., 78 F. 2d 550, 555. * * *"

Appellant in his opening brief has cited many California cases and statutes in support of his position. The following cases and a section from the California Constitution stand for the principle applicable here that a judgment should be sustained unless there is clear from all the record and evidence that the trial below resulted in a miscarriage of justice.

Art. VI, Sec. 4½, Constitution of California, reads in part as follows:

> "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or re-

jection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Amendment approved October 10, 1911.)

"Miscarriage of justice" can only mean the conviction of a person who is probably innocent.

People v. Fleming, 106 Cal. 357;

From Annotation of Treadwell's Constitution of California.

Under this section, substantial injury as well as error must be made affirmatively to appear for the setting aside of a judgment.

People v. Merritt, 18 Cal. App. 58, 122 Pac. 839.

A case will not be reversed for erroneous instructions where the evidence appears to be conclusive of the guilt of the defendant.

People v. Wong Hing, 28 Cal. App. 230, 151 Pac. 1159.

Since the adoption of this section, injury will no longer be presumed from error, but must appear affirmatively upon an examination of the record or from the intrinsic nature of the error itself.

Cuddahy v. Gragg, 46 Cal. App. 528, 189 Pac. 271.

This section abrogates the old rule that "prejudice is presumed from any error of law, and that where error

is shown it is the duty of the court to examine the evidence and ascertain whether the error did or did not in fact work any injury. This section does not repeal or abrogate the constitutional guarantee, accorded accused persons, but every invasion of even a constitutional right does not necessarily require a reversal.

People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042.

Under this provision it is not sufficient to warrant a reversal to show that error has been committed, but after a view of the whole record, the error must be disregarded and the judgment affirmed unless the appellate court is of the opinion that the error resulted in a miscarriage of justice.

People v. Bartol, 24 Cal. App. 659, 142 Pac. 510.

When the guilt of the defendant is clear, errors will be disregarded.

People v. Sevel, 27 Cal. App. 257, 149 Pac. 1004.

In *Tupman v. Haberkern,* 208 Cal. 256, 280 Pac. 970, the Court said:

> "The theory of this section is based upon assumption that the reviewing court *may find error* in the record as a matter of law, and its effect is to release the reviewing court from the rigid rule that prejudice is presumed from error, and to enjoin upon the reviewing court the duty to declare, when confronted in the record with any one or more of the enumerated errors, whether the error found to exist has resulted in a miscarriage of justice, and not to reverse the judgment unless such error be prejudicial. Whether

> the error found to be present 'has resulted in a miscarriage of justice' presents a question of law on the record before the court, and the purpose of the section was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it. * * *"

In order to show error in refusing an instruction the party must bring before the court sufficient evidence to show that upon a proper instruction there might have been a finding in his favor.

> *Mintzer v. City of Richmond,* 27 Cal. App. 566, 150 Pac. 799.

Unless, after reading the evidence, the court shall be of the opinion that a miscarriage of justice has been caused by an error in giving or refusing instructions, the judgment cannot be set aside.

> *People v. Sprague,* 52 Cal. App. 363, 198 Pac. 820.

Erroneous instruction was held not ground for reversal where guilt appears beyond all reasonable doubt.

> *People v. Froelich,* 65 Cal. App. 502, 229 Pac. 471.

Conclusion.

This is a case in which the evidence is undisputed that appellant shot and killed a Chief Petty Officer, who was on active duty with the United States Navy. There was no reversible error committed by the trial court in the conduct of the trial, or in the Court's instructions given to the Jury. The Indictment was adequate and the appellant had a fair and full trial. There is no reason for setting aside the verdict, and no legal or sufficient cause to reduce the offense from murder to manslaughter. The judgment should be affirmed.

Respectfully submitted,

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